No. 11695

In the United States Circuit Court of Appeals for the Ninth Circuit

CAL-BAY CORPORATION, MARIA FARIA, JOSEPH FARIA, JR., EDWARD FARIA AND MAE E. ROCHE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

A. DEVITT VANECH,
Assistant Attorney General.

M. MITCHELL BOURQUIN,
Special Assistant to the Attorney General, San Francisco, California.

ROGER P. MARQUIS,
S. BILLINGSLEY HILL,
Attorneys, Department of Justice, Washington, D. C.

INDEX

CITATIONS

Cases:

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11695

CAL-BAY CORPORATION, MARIA FARIA, JOSEPH FARIA, JR., EDWARD FARIA AND MAE E. ROCHE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal from a final judgment in condemnation entered February 28, 1947 (R. 99–135). Motion for new trial was denied April 8, 1947 (R. 138). Notice of appeal was filed April 26, 1947 (R. 140). The jurisdiction of the district court was invoked under the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 176, 177, 50 U. S. C., App. sec. 632, and the Navy Department Appropriation Act of June 22, 1944, c. 269, 58 Stat. 301 (R. 3).

The jurisdiction of this Court rests on section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

QUESTIONS PRESENTED

1. Whether in a condemnation proceeding by the United States to acquire property on which a gas well has been drilled, the United States must pay for the investment in the well.

2. Whether in valuing unproven mineral interests in the property taken the court committed error in relation to evidence of market value based on speculation.

3. Whether under the evidence the jury was bound to find severance damages.

4. Whether the landowners were denied compensation for their reversionary interests in the minerals.

5. Whether the court exaggerated the claims for compensation.

6. Whether under the evidence the jury was bound to find that the property contained gas in commercial quantities.

7. Whether the landowners were harmed by comments of the court to their witnesses.

8. Whether the landowners' proposed instructions were given to the jury in other language.

STATEMENT

The United States instituted this proceeding to acquire approximately 5,340 acres of land near Port Chicago, Contra Costa County, California, for expansion of the United States Naval Magazine by filing a petition in condemnation on July 22, 1944 (R. 2–11).

For purposes of valuation the area was divided into numbered parcels according to ownership (R. 8–9). Of those, Parcels 57, 58, 59, and 64 are involved in this appeal.

The United States sought and was granted an order for immediate possession on July 24, 1944 (R. 11–13). However, since the drilling of an oil and gas well was under way on Parcel 59, the United States agreed to a modification of the order for immediate possession of Parcels 58 and 59, and a court order was obtained on September 28, 1944, permitting continuation of the drilling operations until thirty days after service of notice by the United States of termination of such right to possession (R. 14–16). Notice of termination was given on December 15, 1944, and possession was surrendered by January 15, 1945 (R. 16–17, 277–280, 1245).

The owners of Parcels 57, 58, and 59, stipulated with the United States as to the amounts to be awarded for their land exclusive of mineral rights under oil and gas leases affecting the parcels (R. 17–28). Pursuant thereto, in March 1945, the court awarded $15,000.00 for Parcel 57, $400.00 for Parcel 58, and $26,780.00 for Parcel 59 (R. 20, 24, 28). Compensation for the owner's interest in Parcel 64 is not involved here.

The oil and gas leases referred to in the stipulations were leases which Joseph Faria and Bud Hildebrand had obtained from the owners of these parcels in 1941 (R. 184–232). They had also secured leases in 1941 and 1942 on neighboring properties. Altogether the leases covered approximately 2,100 acres

(R. 232). The leases were for twenty years and so long thereafter as oil or gas in paying quantities was produced (R. 1218). They reserved a one-eighth, or twelve and one-half percent royalty to the lessor, required the lessees to commence drilling operations within one year and to drill to a depth of 5,000 feet, to drill a new hole if a dry hole resulted from previous drillings, to drill one well on each twenty acres leased, but that, since each lease was one of a series in a general district, drilling within a year under one lease should be deemed drilling under all (R. 1217–1229).

Bud Hildebrand assigned all his interest in these leases to Joseph Faria, and Joseph Faria, in turn, organized the Cal-Bay Corporation on April 17, 1942, and assigned to it 687 acres under these leases (R. 230–232, 315). He retained 1,441 acres (R. 232).

On July 14, 1943, the drilling of a well was commenced on Parcel 59 and proceeded intermittently until July 25, 1944, when notice of the filing of this action was received (R. 233, 250–255). At that time the well had reached a depth of 4,375 feet (R. 151). After permission was given by the United States under the stipulation referred to above, to continue drilling, the well was drilled to a depth of 4,975 feet where, on November 29, 1944, a blow-out of gas collapsed the casing (R. 269, 271, 455, 458). No further drilling was done because of the condition of the well (R. 458) and the fact that notice was received from the Navy on December 15, 1944, requiring surrender of the premises by January 15, 1945 (R. 277–278). The lessees complied with the notice and re-

moved all their equipment, plugged the hole and abandoned the well by that date (R. 16–17, 277–280, 1245).

Trial to determine the values of the leasehold interests of Joseph Faria and the Cal-Bay Corporation and the mineral rights of the lessors, Maria Faria, Edward Faria, and Mae E. Roche, was had in January and February 1947, before Judge Goodman and jury (R. 147–1214).

Both sides offered the testimony of expert witnesses on the question as to whether gas in commercial quantities had been discovered or would be discovered in the structure at greater depth and as to the values of the interests condemned. In addition to the values of the mineral interests taken from them, the appellants sought damages for the severance of these properties from others in which they had mineral interests that were not taken.

The ownerships, acreages, claims, testimony of values and awards for each parcel are set forth in tabular form as an appendix to this brief. As may be seen from that tabulation, there is a marked spread between the valuations adduced by the landowners and those of the Government. This is due to the differing views of the expert witnesses for each as to the possibility that gas was present in commercial quantities beneath the properties taken and the market price for properties with the history and geologic structure of those involved here.

The court below was impressed with what seemed to it to be extreme and exaggerated claims on the part

of the landowners. During the testimony of the landowners' witnesses the court interposed questions, on three occasions, seeking more specific information than had been given as to the basis for and method of calculating their valuations (R. 850–857, 905, 908, 926–927). On one of these occasions the questioning concluded with the following (R. 856–857):

> Q. It is on that speculative basis that you have stated that you based your valuation of this oil royalty.
>
> A. Yes, it is, your Honor.
>
> The COURT. I am sorry to have taken up so much of the time of Counsel in this matter, but I wanted to find out the basis upon which—a matter that was not touched by Counsel—the royalty was calculated by the witness.

No objection was made to this by counsel for the appellants. At another time, when the landowners' witness stated that he knew of a lessor's interest in unproven land which had been sold for $3,500 a percent, and could prove it by the records of the Corporation Department of California, the court said: "I just can't believe you are telling the truth on that * * * I do not know what has happened to our Corporation Department in the State of California. That is all I can say." (R. 906–907.) Immediately thereafter the court apologized for those comments and upon objection by the landowner's counsel instructed the jury to disregard them (R. 907). Counsel for the landowners acknowledged that the instruction was sufficient (R. 908).

Near the close of the trial the judge summoned counsel for both sides and out of the presence of the

jury told them that he thought it fair to advise them prior to their argument to the jury that: "I feel duty bound in this case, from what I have heard, to tell this jury that in the opinion of the court the view of the so-called experts presented by the defendants is entitled to no weight whatsoever, and that the opinions that they have given are fantastic and are at a borderline, at a point where a more serious criticism could be made of them * * * I am very frankly stating the view of the court. It is not binding on the jury, and when I give it to them I shall be most specific to tell the jury that they can come to any opinion that they want on that subject, but I shall nevertheless feel it my duty, as I have had occasion to do only once before in any case since I have presided in this court, to express an opinion on the facts of the case; but I feel that my conscience prompts me in this case to make an observation to the jury as to the opinion of the court as to the weight of this evidence * * * I am not called upon to pass upon this question yet, but if the jury were, despite the statement of the court as to its opinion as to the weight of the evidence, to bring in a verdict for any large sum in this case I would feel duty bound to set it aside, because this case does advise some technical aspects and the jury might very easily be misled. * * * In order that the record may be quite clear, I wish to repeat again I have made this statement to counsel only for the purpose of advising them in advance, so that counsel may be free, so far as I am concerned, to tell the jury, if they wish, that the judge has already told them his opinion of the weight of the evidence, but counsel are

778826—48——2

of a different opinion, and they feel free to tell the jury what they think about the case. I have no objection, whatsoever, to the matter being opened up, so that counsel can take, if they wish, the sting out of the judge's comment on the evidence in advance in their argument, if they wish to, and that is the purpose of my statement now." (R. 1138–1143).

Following the advance notice thus given to counsel, the court instructed the jury as follows (R. 1188–1189):

> Ordinarily, ladies and gentlemen, the court, as I stated to you before, abstains from expressing opinions as to the weight of the evidence. However, due to the somewhat apparent complexities of this case, and in order to be of assistance to the jury in the proper administration of justice, I believe it is my duty to make the following comment to the jury: In the opinion of the court the values fixed by the expert witnesses produced by the defendants in this case appear to the court to be so exaggerated as to make the testimony of those witnesses incredible. The opinion that I have expressed is just the opinion of the court. A Federal judge is permitted to make such a comment to the jury. The jury is not bound by the opinion of the court. The opinion is expressed as a part of the instructions as to the law for such aid as the jury wishes to make of it in determining the factual question. The jurors individually and collectively are entitled to disagree with the opinion of the court. You may have your own opinion and you can come to it. You are not bound in any manner in making a find-

> ing in accordance with the view expressed by the court. The reason why the court has expressed the opinion is that it appears to the court that there is no factual basis presented in the testimony of the expert witnesses for the defense upon which the opinion of value given by them can be said to rest.

Thereafter, on February 7, 1947, the jury returned verdicts awarding compensation for the taking of each separate interest in the properties in the highest amounts testified to by the Government's two expert witnesses (R. 63–67). Judgment was entered in accordance with the verdicts on February 28, 1947 (R. 99–135).

Appellants moved for a new trial on March 13, 1947, urging (a) irregularities in the proceedings of the court by which they were denied a fair trial, (b) inadequate damages, (c) insufficiency of the evidence to justify the verdict, (d) the verdict to be against the law, and (e) error in law occurring at the trial (R. 136–138). The court denied the motion on April 8, 1947 (R. 138). This appeal followed (R. 140).

ARGUMENT

I

The awards are not inadequate as a matter of law

Appellants contend that the awards in this case are inadequate as a matter of law and do not represent the just compensation for the taking of private property required by the Fifth Amendment to the Constitution (Br. 10, 23–28). But it is not the function of this

court to reweigh the evidence. As the court said in *Ramming Real Estate Co.* v. *United States,* 122 F. 2d 892, 895 (C. C. A. 8, 1941), verdicts within the range of the evidence "are conclusive of the facts and cannot be set aside on appeal as being against the weight of the evidence." *Puget Sound Power & Light Co.* v. *City of Puyallup,* 51 F. 2d 688, 690 (C. C. A. 9, 1931); *Miller* v. *United States,* 137 F. 2d 592, 594 (C. C. A. 3, 1943). In the instant case the verdict was within the range of the evidence. And as we shall show there was no error of law committed either in rulings during the trial or in the instruction to the jury.

A. *Appellants were not entitled to recover their investment in the well.*—The principal argument advanced by appellants in support of their contention has to do with recovery of the cost of drilling the well on Parcel 59. They urge in their brief that since "the appellee destroyed an investment of over $250,000 by appellant Cal-Bay Corporation in the property it held under oil and gas leases," the awards, which clearly do not reimburse them for that expenditure, are "inadequate as a matter of law and are not just compensation" (Br. 6, 23, 24, 25). The evidence of values submitted by the appellants at the trial was also aimed to a large extent at recouping this expenditure (R. 232–233, 252–255, 281–283, 298–300, 336, 339–342, 528–530, 540, 735–738, 816, 828, 868–869, 886). The Government objected to evidence of values based on the cost of drilling the well (R. 253–254, 886), but was overruled on the ground that cost might have some bearing on values (R. 888). Thus, appellants do not

and could not complain of any ruling on evidence in this regard. Nor did they object to the instructions to the jury on this subject which were as follows (R. 1184–1185, 1189, 1191, 1192):

> Compensation cannot be awarded for loss of business. The mere fact that a business is conducted on a property which has been taken under the right of eminent domain is interrupted or destroyed by the taking does not constitute a taking of property or interest for which the owner is entitled to compensation. Compensation is to be awarded for the taking of the property or interest itself as distinguished from any activity or business thereon carried on.
>
> * * * * *
>
> In determining the market value of the mineral rights, if any, in this parcel, you may consider the amount, if any, which the existence of this hole enhanced the market value of these rights. However, it is not within your province to evaluate the hole or to give any consideration to the cost of drilling the same or the reproduction cost thereof. You must determine, as I have already instructed you, what amount in terms of cash a willing buyer would have paid to a willing seller for the mineral rights in this parcel of land with full knowledge of all the facts, including all the facts having to do with the presence of and the drilling of this hole on the property. You are not at liberty to assess the value of the mineral rights if you find that they have a value and of the hole, and by a process of addition fix the total value of the mineral rights.
>
> * * * * *

> It has been stated to you by counsel during argument that unless compensated by a verdict of the jury the defendants will not be reimbursed for their efforts expended in connection with their gas exploration project. Such reimbursement, however, has no part in the scheme of just evaluation of the defendants' alleged mineral rights. Many explorations for gas and oil are made all over the world and in innumerable instances are unsuccessful. The Government, because of its exercise of its right of eminent domain to take this property, cannot be charged with the drilling or other expense of the defendants. It is only required to pay the market value as I have defined that term to you of the interest that was taken.
>
> * * * * *
>
> Likewise the amount that an owner invests in his property is not germane in determining the matter of market value. I may pay $50,000 for a piece of property, perhaps yielding to the importunities of some glib salesman, and yet the market value of that property may be only $10,000. If the Government takes that property, the Government is only required to pay the market value of $10,000, no matter what I may have paid for it or invested in it, because by law just compensation always is only concerned with market value.

That instruction denying recovery of the cost of the well or other business losses correctly states the law. The Fifth Amendment does not guarantee a return of investment that may have been made in property. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 285 (1943); *Foster* v. *United States,* 145 F. 2d

873 (C. C. A. 8, 1944); *Kinter* v. *United States,* 154 F. 2d 5 (C. C. A. 3, 1946); cf. *United States* v. *Certain Parcels of Land in Spokane,* 45 F. Supp. 899 (E. D. Wash., 1942). And as the Supreme Court said in the *Powelson* case, *supra,* pp. 281–282:

> This public project, to be sure, has frustrated respondent's plan for the exploitation of its power of eminent domain. We may assume that that privilege was a thing of value and that this frustration of the plan means a loss to respondent. But our denial of compensation for that loss does not make this an exceptional case in the law of eminent domain. There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. The point is well illustrated by two other lines of cases in this field. It is a well settled rule that while it is the owner's loss, not the taker's gain, which is the measure of compensation for the property taken (*United States* v. *Miller, supra; United States* v. *Chandler-Dunbar Co., supra,* p. 81; *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195), not all losses suffered by the owner are compensable under the Fifth Amendment. In absence of a statutory mandate (*United States* v. *Miller, supra,* p. 376) the sovereign must pay only for what it takes, not for opportunities which the owner may lose. See Orgel, Valuation Under Eminent Domain (1936) § 71, § 73.

Loss of profits, damages resulting from removal of personal property from land condemned, frustration of contracts relating to the property, loss of good will

and other business losses are refused in federal condemnation proceedings as being consequential. "Such losses are apart from the value of the thing taken. They are personal to the [condemnee]." *United States* v. *Petty Motor Co.,* 327 U. S. 372, 378 (1946). *Mitchell* v. *United States,* 267 U. S. 341, 345 (1925); *Joslin Co.* v. *Providence,* 262 U. S. 668, 675 (1923); *United States* v. *Becktold Co.,* 129 F. 2d 473, 476 (C. C. A. 8, 1942); *Stephenson Brick Co.* v. *United States,* 110 F. 2d 360 (C. C. A. 5, 1940); *United States* v. *10,620 Square Feet, Etc.,* 62 F. Supp. 115, 120 (S. D. N. Y., 1945); *United States* v. *40.558 Acres of Land, Etc.,* 62 F. Supp. 98 (D. Del., 1945); *United States* v. *8,286 Sq. Ft. of Space, Etc.,* 61 F. Supp. 737, 740 (D. Md., 1945); *United States* v. *Certain Parcels of Land,* 54 F. Supp. 561 (S. D. Cal., 1944); *Kellettville Gas Co.* v. *United States,* 56 F. Supp. 919, 922 (W. D. Pa., 1944).

In the instant case the court admitted all the evidence of the cost of the well and of the business venture which was offered by the appellants. The appellants cannot complain because the jury was correctly instructed as to the relevance of this evidence. Nor can they complain that the awards are inadequate in law because the jury did not reimburse them contrary to the instructions for their business expenditures. Moreover, there is credible evidence that the well with its history and undesirable mechanical condition at the date of taking was a liability to the properties rather than a benefit (R. 1088–1089, 1133).

B. *The court did not commit error in relation to testimony of value based on speculation.*—Appel-

lants also complain because, in their view, the trial court misapplied the law in looking with disfavor upon the values testified to by their witnesses because they were grounded on speculation and conjecture (Br. 26–28, 40). In support of their conclusion that this resulted in awards "inadequate as a matter of law," the appellants rely on *Montana Ry. Co.* v. *Warren,* 137 U. S. 348 (1890), and *Eagle Lake Improvement Co.* v. *United States,* 141 F. 2d 562, 564 (C. C. A. 5, 1944), where it was said that the market value of mineral interests must in the nature of things rest on speculation (Br. 26–28, 40). However, appellants do not contend that any evidence offered by them was rejected on the ground that it was speculative. Here again all of the evidence submitted by them was considered by the jury.

Appellants' sole contention is that the court improperly interrogated appellants' witnesses to show that their opinions of value were based on speculative elements and told the jury that their valuations were "so exaggerated as to make the testimony of those witnesses incredible" (Br. 31, 35, 40, R. 1188). No law is cited which forbids the court to question a witness in order to bring out the basis for his opinion and none, in fact, exists. Nothing in the rulings on evidence, the questions and comments of the court, or the charge to the jury violated the rule in the *Montana Ry. Co.* and *Eagle Lake Improvement Co.* cases. The court admitted all the testimony of the witnesses and left the jury free to decide what evidence it believed. Just as there are degrees of cer-

tainty with which a fact may be established, there are degrees of persuasiveness. The trial court did no more than honestly state the degree to which it was persuaded by the testimony based on varying degrees of speculation in this case. It is well-settled that in the federal courts "the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed." *Vicksburg, Etc., Railroad Co.* v. *Putnam,* 118 U. S. 545, 553 (1886); *Patton* v. *United States,* 281 U. S. 276, 288 (1929); *St. Louis, Etc. Railway* v. *Vickers,* 122 U. S. 360, 363 (1886); *Patton* v. *Texas and Pacific Ry. Co.,* 179 U. S. 658, 660 (1901). Appellants rely (Br. 40, 42) upon *Quercia* v. *United States,* 289 U. S. 466 (1932). But that was a case where the court added to the evidence and based its instruction upon such addition. Nothing like that was done here where the court merely exercised his discretion to comment upon the opinion evidence.

C. *Under the evidence the jury was not bound to find severance damages.*—Appellants further complain because the jury found that they were not damaged by the severance of the parcels taken from the other lands owned or leased by them (Br. 24–26). They do not cite the exclusion of any evidence, improper instructions, or other ruling of law by the court

below which may have been the cause of this finding by the jury. They contend generally (Br. 28) that the verdicts are not supported by the evidence. But, in opposition to appellants' evidence that large severance damages resulted from the taking, there was abundant, credible evidence offered by the Government that the remaining lands were not damaged because they embrace a substantial acreage which would give the lessees ample opportunities to locate wells and to drill them to whatever horizon they saw fit (R. 1189–1191, 1132–1133). The jury was carefully and correctly instructed on the question of severance damages (R. 1190). Under the evidence and the instructions the jury was free to award whatever damages they believed had been shown. Their opinion that no damage was suffered is a determination of fact under the evidence and is not subject to review.

D. *Appellants were not denied compensation for their reversionary interests.*—Appellants also complain because, they contend, the owners of the fee in the properties received awards only for their royalty interests under the leases and nothing for their reversionary interests (Br. 25, 44). They state this to be a fact and assign responsibility for it to the forms of verdicts submitted to the jury which referred only to two kinds of interests in these properties: royalty interest and leasehold estate (R. 1195, 1202–1203, Br. 44). Counsel for appellants objected to this form of verdict at the time it was submitted to the jury, but the court declined to change it because he thought there could "not be any con-

fusion on that," it was "merely a convenient way to refer to the interest," and he "was afraid that the jury might be confused when we are talking about these landlords and still referring to them as mineral interests, and they would not know that was the same kind of interest as the other defendants" (R. 1202–1203).

This contention of appellants cannot be sustained. In their opening statement to the jury they referred to the lessors' interest exclusively as a "royalty interest" in eliciting opinions of value from their witnesses they used that expression without exception, and made no objection to the same use throughout the Government's testimony. (R. 168–169, 802–804, 863, 1085–1087, 1130–1132). The entire trial was conducted on that basis. Accordingly, the court was eminently correct in believing that a change in terminology at the very last minute would confuse the jury. This is not to say that appellants were not awarded the value of that interest. They included the reversionary interest in their values under the phrase "royalty interest," for they offered no separate figures. The United States did the same. Thus, the verdicts of the jury clearly included those interests because they had no other evidence or theory of the case to rely on. Finally while the forms of the verdicts referred simply to "royalty interest" the court made it clear in its instructions to the jury that the reversionary interests were included (R. 1185).

E. *The court did not exaggerate appellants' claims for compensation.*—Appellants urge further that the

trial court erred in stating to the jury in its instructions that the appellants claimed $786,225, the amount set forth in their answers, rather than $662,355, the amount testified to by their witnesses at the trial (Br. 41–42, 46–47). This, they contend, was prejudicial because it erroneously exaggerated their claims for compensation. Moreover, they urge that because the $662,355 testified to by their witnesses included $234,000 as the value of the well, the court should have told the jury that their claims were for $428,355 (Br. 42).[1] This, it is said, would have contrasted more favorably with the $3,865 testified to by the witnesses for the Government. But the total compensation sought by appellants in their proposed instructions to the jury was $786,225, which is the exact figure given to the jury by the court (R. 88–94). The court correctly told the jury that the $786,225 was the amount of the appellants' "total claims of values" (R. 1193–1196). Moreover, contrary to their statement, the values testified to by their witnesses totaled $782,500[2] instead of $662,355. This is so close to the amount stated by the court as to make the difference negligible. And, finally, appellants made no objection to this instruction in the court below.

---

[1] The cost of the well was included by all of appellants as a part of the property valuation (R. 816, 828, 868–869, 886, 1191). Appellants did not seek to secure a separate verdict on this item and, if allowed, it would clearly have been erroneous. See *supra*, pp. 12–14.

[2] Computed by adding the highest valuations testified to by their witnesses. See Appendix.

F. *Under the evidence the jury was not bound to find that appellants' properties contained gas in commercial quantities.*—Finally, appellants contend that the awards are inadequate in law, that is, not supported by the evidence, because the record shows that the well was in an oil- or gas-bearing area, that gas of commercial quality was discovered in volumes increasing as the well penetrated deeper, and that the inescapable conclusion is that gas in commercial quantities would have shown if the Government had not taken the property before the well could be drilled further (Br. 23–24). The evidence presented by the appellants, of course, was directed to establish these facts. Their witnesses contradicted each other as to whether commercial gas was shown by the blow-out (R. 710, 734–739, 810), but were unanimous in their views that there was a possibility of commercial gas underneath the lands (R. 682, 782, 811–813, 869–870). However, the case is not to be judged on appellants' evidence alone. The Government offered abundant, credible evidence to show that the traces of gas in the well were not significant and that this was not an area susceptible of commercial production of gas, because there is no anticline capable of trapping and holding gas and the structure is strongly faulted (R. 980–1126). For example, the witness Taliaferro, consulting geologist for thirty-two years and professor of geology at the University of California at Berkeley, who had personally mapped 3,800 square miles of California, including this area, and who had spent fifteen days again inspecting and mapping this prop-

erty at the request of the Navy, testified as follows (R. 987, 989):

> Q. Would you consider the Cal-Bay Corporation a favorable structure in which to explore for a commercial accumulation of oil or gas?
>
> A. Emphatically not. Had I been sent out to report on such an area, either a new area or a submission, I would never have recommended the drilling of a well in that location. In fact, I would have turned the thing down and so reported.
>
> * * * * *
>
> Gas in the cretaceous of northern California is exceedingly common. There are innumerable gas and oil seepages.
>
> * * * * *
>
> The wells do not yield in barrels per day, but in gallons per month, which you could hardly consider commercial.

That alone was sufficient evidence on the question of commercial gas to support the awards of the jury.

II

The appellants had a fair trial

The appellants list several acts and omissions of the trial judge which, they contend, showed him to be an avowed partisan and denied them a fair trial and due process of law (Br. 10–23, 28–48). These charges are without merit and may be disposed of as follows:

A. *Appellants were not harmed by the court's comments to their witnesses.*—Appellants quote at length from the record to show that the trial judge branded

their witnesses Wents and Bradford prevaricators (Br. 29–39). Nothing is present in the colloquy between the court and Wents to sustain that charge (Br. 29–35, 38–39). Counsel for appellants made no objection to the questioning of Wents at the time (R. 857, 927). Appellants concede that Wents' testimony was based on speculative considerations and argue that in the nature of things it had to be (Br. 40). The fact that the court brought this to light on the ground that it was "a matter that was not touched on by counsel" was, therefore, not error. If this adversely affected the jury's opinion of this witness and if opinions of value in this case must necessarily be based on speculation, counsel for appellants was at liberty to cancel out the effect by later cross-examining the witnesses for the Government to show the extent to which they relied on unproven facts.

The situation as to Bradford is somewhat different. After that witness had said that he knew of a sale of a lessor's interest in a gas lease on unproven property for $3,500 a percent, the court said: "I just can't believe you are telling the truth on that," and "Well, I do not know what has happened to our Corporation Department in the State of California" (Br. 36–37, R. 906–907). Counsel for appellants objected to this as prejudicial to their case (Br. 37, R. 907). The court stated at that time in the presence of the jury (Br. 37, R. 907):

> I am sorry to have made this comment. I will tell the jury to disregard it. It is just a comment of the Court.
>
> * * * * *

> I will tell the jury to disregard the Court's statement. The comment of the Court was on the weight of the evidence and the Jury is not bound by it. The Jury can decide the case if and when it comes time for the Jury to decide the case, according to their own lights and according to the instructions the Court may give them at that time. The Court, of course, has a right to make comments as to the weight of the evidence, but the jury is not bound by what the Court says in that regard. It may form its own judgment. Does that instruction cover what you have in mind?

Counsel for appellants replied: "Yes, your Honor. Thank you." Later, at the conclusion of the trial, the Court elaborately repeated this instruction (R. 1176–1177, 1180, 1188–1189, see *supra,* p. 8). Under these facts it is not perceived how the jury could have failed to understand that the comments of the court were not to affect their verdict if they held a contrary view of the weight of the evidence. If the Court "promptly instructs the jury to disregard the unjustified statements, it cannot well be assumed that the jury took no heed of the withdrawal and disobeyed the positive mandate of the court." *Washington & O. D. Ry. Co.* v. *Dulany,* 288 Fed. 421, 427 (App. D. C. 1923); *Gregory* v. *Morris,* 96 U. S. 619 (1877). The court was, we submit, eminently fair to appellants in his conduct of trial. He gave appellants ample warning of the comments he proposed to make upon the evidence and was extremely careful to advise the jury that it was not bound by his comments. Acceptance of appellants' contention would, in effect, nullify the

judge's duty to comment on the evidence where, in his opinion, the proper administration of justice requires it.

B. *Appellants' proposed instructions were given to the jury in other language.*—Appellants complain that the court erred in refusing to give their proposed instruction to the jury that the preponderance of the evidence does not require "such degree of proof as, excluding all possibility of error, produces absolute certainty, because such proof is rarely possible" (Br. 44–45, R. 79). That proposed instruction was not necessary. The court correctly and completely defined the burden of proof for this case by stating (R. 1179–1180): "The preponderance of the evidence means that the testimony of the defendants as to the value of the land or property or interest taken must have greater weight in your opinion and more convincing effect than that of the plaintiff." Cf. *Spreckels* v. *Brown,* 212 U. S. 208 (1908); *Sebastian Bridge Dist.* v. *Missouri Pac. R. Co.,* 292 Fed. 345 (C. C. A. 8, 1923).

Appellants urge that the court erred in not giving their proposed Instructions Nos. 40, 41, and 43 to the effect that market value could be based on speculative elements (Br. 45, R. 94–95, 97). That instruction was not necessary. The court fully and correctly defined market value as "the highest value in terms of money which the property or interest will bring if exposed to sale for cash in the open market in the community in which it is situated, with a reasonable time to find a purchaser buying with full knowledge of all the uses and purposes to which it is adapted and for which it

is capable of being used, the seller not being required to sell or the buyer not being required to buy at the time" (R. 1182–1183, 1189).

Appellants contend that the court erred in refusing their Instruction No. 44 to the effect that the jury should reject testimony which it found minimized or diminished values (Br. 45–47). The ground for this is that the court's comment concerning the exaggerated values of the appellants' witnesses required counterbalance (Br. 46). Their proposed instruction was not necessary. As we have shown, the court gave a careful and correct definition of the market value which the jury was to find (R. 1182–1183, 1189). The court's comment on the evidence was carefully set apart and put in proper perspective by the repeated statements that the jury was free to disagree with it. If the court is required to counterbalance each comment it makes upon the evidence its right to comment thereon would be meaningless.

Appellants' charge that the court committed "unmistakably prejudicial error" in not giving their proposed Instruction No. 45, to the effect that "comments of a trial judge have no greater weight than arguments of counsel" (Br. 47) is clearly without merit in view of the careful and repeated instruction that the "jurors individually and collectively are entitled to disagree with the opinion of the court" (R. 1188–1189).

Appellants were not entitled to every instruction they offered. As the Supreme Court said in *Railway Co.* v. *McCarthy,* 96 U. S. 258, 265 (1877): "It has been repeatedly determined by this tribunal that no court is bound to give instructions in the forms and

language in which they are asked. If those given sufficiently cover the case, and are correct, the judgment will not be disturbed, whatever those may have been which were refused." See also *Indianapolis, Etc. R. R. Co.* v. *Horst,* 93 U. S. 291, 295 (1876).

Finally, it is apparent from the foregoing that the court did not, as appellants contend (Br. 48), abuse its discretion in denying their motion for a new trial.

CONCLUSION

It is submitted that the judgment below is correct and should be affirmed.

Respectfully.

A. DEVITT VANECH,
Assistant Attorney General.

M. MITCHELL BOURQUIN,
Special Assistant to the Attorney General,
San Francisco, California.

ROGER P. MARQUIS,
S. BILLINGSLEY HILL,
Attorneys, Department of Justice,
Washington, D. C.

FEBRUARY 1948.

APPENDIX

Tabulation of ownerships, acreages, claims, valuations and awards

	Acres leased	Leased acres taken	Leased acres not taken	Testimony as to values						
				Claim	Appellants' witnesses			Government's witnesses		
					J. Faria	Wents	Bradford	Armstrong	Paine	Awards
Parcel 57:										
Cal-Bay	(R. 196)			(R. 44)	(R. 290)	(R. 800)	(R. 862)	(R. 1086)	(R. 1130)	(R. 65)
Leasehold	4.96	All	None	$3,850	$5,000	$3,850	$5,000	$10	$60	$60
Mae E. Roche	(R. 196)			(R. 49)	(R. 198)	(R. 805)	(R. 864)	(R. 1086)	(R. 1130)	(R. 67)
Mineral rights	4.96	All	None	$3,500	[1] $3,500	$300	$1,000	$25	$60	$60
Parcel 58:										
Cal-Bay	(R. 192)			(R. 44)	(R. 289)	(R. 800)	(R. 862)	(R. 1085)	(R. 1131)	(R. 65)
Leasehold	5	All	None	$3,900	$5,000	$3,875	$5,000	$10	$30	$30
Edw. Faria	(R. 192)			(R. 61)	(R. 194)	(R. 804)	(R. 863)	(R. 1085)	(R. 1131)	(R. 63)
Mineral rights	5	All	None	$3,500	[2] $3,500	$300	$1,000	$25	$50	$50
Cal-Bay		(R. 799)	(R. 800)	(R. 44)	(R. 288)	(R. 799)	(R. 862)	(R. 1085)	(R. 1131)	(R. 65)
Leasehold	367.36	208.83	158.53	$461,000	$367,000	$411,500	$358,000	$420	$836	$836
Cal-Bay				(R. 45)	(R. 291)	(R. 800)		(R. 1090)	(R. 1132)	(R. 65)
Severance				$150,000	$61,000	$91,150		None	None	None
Parcel 59:										
J. Faria		(R. 801)	(R. 801)	(R. 40)	(R. 298)	(R. 801)	(R. 863)	(R. 1086)	(R. 1131)	(R. 64)
Leasehold	73.51	63.91	9.60	$17,575	$23,625	$17,575	$51,200	$320	$512	$512
J. Faria				(R. 40)	(R. 296)	(R. 801)		(R. 1090)	(R. 1132)	(R. 64)
Severance				[3] $31,850	$3,750	$1,920		None	None	None
M. Faria	(R. 185)			(R. 56)	(R. 188)	(R. 802-3)	(R. 866)	(R. 1085-6)	(R. 1131-2)	(R. 66)
Mineral Rights	440.87	272.74	168.13	$75,000	[4] $110,000	$75,235	$51,200	$1,370	$2,312	$2,312
M. Faria				(R. 56)		(R. 802-3)		(R. 1090)	(R. 1133)	(R. 66)
Severance				$35,875		$35,875		None	None	None

See footnotes at end of table.

Tabulation of ownerships, acreages, claims, valuations and awards—Continued

	Acres leased	Leased acres taken	Leased acres not taken	Testimony as to values						
				Claim	Appellants' witnesses			Government's witnesses		
					J. Faria	Wents	Bradford	Armstrong	Paine	Awards
Parcel 64:										
J. Faria Leasehold	(R. 297) 228.55	(R. 297) .65	227.90	(R. 40) $175		(R. 801) $175	None	(R. 1087) $5	(R. 1132) $2.60	(R. 64) $5
J. Faria Severance				[5]		(R. 802, 834) $26,200		(R. 1090) None	(R. 1133) None	(R. 64) None
Severance for 310 acres leased by Cal-Bay from Alvernaz but not taken (R. 800, Br. 4)						(R. 800) $35,650				

[1] Testimony of Mae E. Roche (R. 198).
[2] Testimony of Edw. Faria (R. 194).
[3] Includes severance for Parcel 64.
[4] Testimony of Maria Faria (R. 188).
[5] See footnote 3.

U. S. GOVERNMENT PRINTING OFFICE: 1948